Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 42 | Issue 3 Article 7

Spring 1967

A Proposal For a Modified Standard of Care For the Infant Engaged in an Adult Activity

A PROPOSAL FOR A MODIFIED STANDARD OF CARE FOR THE INFANT ENGAGED IN AN ADULT ACTIVITY

A trend can be discerned in recent case law, supported by legal writers, to adopt the reasonable man standard to measure the conduct of a minor engaged in an adult activity. This trend is premised upon the elusive concepts of social desirability and public necessity. A review of the cases and articles indicates that the trend has evolved without a proper weighing by courts and writers of the equally elusive countervailing policy considerations that support the more traditional subjective standard of care. These considerations suggest that the current trend should be modified by a qualified union of the two standards so that the public interest would be served without denying the child his day in court in his true posture of childhood.

The Subjective Standard

Traditionally, courts have adopted a subjective standard of care for determining the alleged primary or contributory negligence of a child.[1] The adoption of this standard permits the court to weigh the child's age, experience, and level of intelligence.[2] Thus, the "ordinary care" required of the child is that degree of care which children of the same age, experience, and intelligence are accustomed to exercise under like circumstances.[3]

---

1. See, *e.g.*, Bullock v. Babcock, 3 Wend. 406, 407 (1829) ("Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults. . . ."); Keller v. Gaskill, 9 Ind. App. 670, 36 N.E. 303 (1894); Briese v. Maechtle, 146 Wis. 89, 91-92, 130 N.W. 893, 894 (1911) ("The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.")

2. See Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618, 620 (1928) (the courts have named in diverse combinations the following qualities which are to be individualized: age, ability, alertness, appreciation, capability, capacity, comprehension, discernment, discretion, development, education, experience, intelligence, judgment, knowledge, maturity, reason, sex, understanding, age is included in all the combinations."). See also *Negligence—Standard of Care Required of a Child*, 25 ILL. L. REV. 214 (1930); Mertz, *The Infant and Negligence Per Se in Pennsylvania*, 51 DICK. L. REV. 79 (1946); Fleming, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

3. *Contra*, one early case espoused the view that the objective reasonable man standard alone controls the measurement of infant care. Neal v. Gillett, 3 Conn. R. 436, 442 (1855) (the court approved a charge to the jury, "that inasmuch as the plaintiff claimed to recover only his actual damages, the age of the defendant [a minor] was not to be taken into account, by the jury, in determining the question of negligence. . . ."); a minority of decisions and writers advocates differentiating infant cases by applying the subjective standard of care when contributory negligence is asserted and the objective reasonable man standard when primary negligence is alleged. See Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919); Dellewo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961) (the court recognized that there may be a difference be-

The subjective standard of care involves a dual approach to infant negligence that embraces both a subjective and an objective appraisal of the child's conduct. As one author has concluded:

> The mental capacity, the knowledge and experience of the particular child, are to be taken in consideration in each case. These qualities are individualized—subjective—but only for the purpose of determining whether or not the child was capable of perceiving the risk of injury. . . . Beyond that, there is an objective standard. In determining whether or not his conduct was proper in view of his intelligence, knowledge, and experience, his conduct is to be compared with that of the careful and prudent child of similar qualities . . . so in the case of infants, the element of prudence is standardized.[4]

The application of the subjective standard of care establishes a double standard: the manner by which a child's conduct is measured and his liability is determined is different from that applied to an adult. The

---

tween the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to danger); Zuckerbrod v. Burch, 88 N.J. Super. 1, 8, 210 A.2d 425, 429 (1965) ("usually a child needs less maturity . . . to foresee consequences of his own acts than to comprehend and avoid the danger created in whole or part by the acts or neglect of others."); Terry, *Negligence,* 29 HARV. L. REV. 40, 47 (1915) ("Every man, whether he is a standard man or not, is required to act as a standard man would. If by chance he is not such a man, he may . . . make a mistake and act so as to be guilty of legal negligence, though he has used all such care and forethought as he was capable of. In the case of contributory negligence, there is an exception to this rule . . . [*i.e.*] children . . . are not required to act like a standard man, but only to use such judgment as they are capable of.").

The majoriy of authors and courts contend that no difference in principle exists between questions of primary negligence and questions of contributory negligence, and that it is arbitrary and inconsistent to distinguish between the care demanded of an infant in his own protection and that required of him in his conduct toward others. See, *e.g.,* Bohlen, *Liability in Tort of Infants and Insane Persons,* 59 AM. L. REV. 864, 888 (1948) (such a distinction is "arbitrary and inconsistent"); Longeteig, *The Minor Motorist—A Double Standard of Care,* 2 IDAHO L. REV. 103 (1965); O'Neill, *Torts: Standard of Care Applied to Minors in Operation of Dangerous Instrumentalities,* 3 TULSA L. REV. 186 (1966); Glover, *Liability of an Infant of Tender Years for Primary Negligence,* 19 OKLA. L. REV. 332, 334 (1966) ("Illogical to afford an infant more favorable treatment in cases where the issue is one of primary negligence than in cases involving contributory negligence. . . . [I]t would be desirable to eliminate this needless dichotomy. . . ."); PROSSER, TORTS § 32 (3d ed. 1964); Charbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); Nielsen v. Brown, 232 Ore. 426, 446, 374 P.2d 896, 905 (1962) (immaterial whether the child is plaintiff or defendant).

4. Shulman, *supra* note 2, at 625; see 2 HARPER & JAMES, TORTS § 16.8 (1956); RESTATEMENT (SECOND), TORTS § 283A (1965); O'Neil, *supra* note 3, at 187; Keltch v. Strunk, 295 P.2d 785 (Okla. 1956); Chernotik v. Schrank, 76 S.D. 374, 79 N.W.2d 4 (1956); Cleveland Park Club v. Tere, 165 A.2d 485 (D.C. 1960); Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Wittmeir v. Post, 78 S.D. 520, 105 N.W.2d 65 (1960); Coleman v. Baker, 382 S.W.2d 843 (Ky. 1964); Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965); Kelley v. Brian, 415 P.2d 693 (Idaho 1966).

conduct of the adult is measured against the single objective standard of a "reasonable man," whereas that of the minor is gauged first by a subjective standard and second by the objective standard of a "reasonable child" of equivalent age, experience, and intelligence.[5] This judicial distinction between adult and child gains support from the principle that the law of torts neither protects all interests from invasion nor attaches liability to every activity merely because it causes harm.[6]

It has been suggested that in practical application the subjective standard, with its dual approach, has stronger overtones of subjectivity than of objectivity.[7] One cannot estimate to what extent the subjective standard unduly influences jurors nor how many litigants have suffered unusually harsh judgments as a result of the jury's application of the subjective standard. A review of the cases suggests that the triers of fact are often drawn to the child's cause upon hearing: "the law does not presume the same capacity as an adult to appreciate the dangers of a known condition. The jury has the right to judge the child's conduct by a lesser standard of care. . . ."[8] A comparison of three exemplary cases illustrates the risk of over-subjectivity inherent in the application of the subjective standard.

All three cases presented the question whether a minor defendant's misconduct was willful and wanton under guest statutes. In *Chernotik v. Schrank*,[9] the South Dakota Supreme Court ruled that the evidence was not sufficient to take the case to the jury. The court reasoned that a sixteen-year-old could not have been conscious that driving 50 to 60 miles per hour on a country gravel road in violation of parental instruction would result in serious harm. In *Mosconi v. Ryan*,[10] a California court held that a sixteen-year-old defendant did not have an appreciation of the danger involved in driving 70 to 80 miles per hour on a heavily traveled road that was eighteen feet wide and marked with "bad curve" signs. In

5. Normally, the question of an infant's liability is for jury determination unless the conclusion is so evident from the facts that reasonable minds could not differ as to the answer. See Laidlow v. Baker, 78 Idaho 67, 297 P.2d 287 (1956) (authorizes a nonsuit or directed verdict where there is no other reasonable interpretation of the evidence); Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965) (normally capacity is a question of fact for the jury); Zuckerbrod v. Burch, 88 N.J. Super. 1, 210 A.2d 425 (1965) (if reasonable men could not disagree, the judge then decides the question of capacity as a matter of law); Donohue v. Rolando, 16 Utah 2d 294, 400 P.2d 12 (1965) (unless a child is so young as to require the court to judicially know that he is not responsible for his act, or he is so mature that the court must know that though a minor, he is responsible).

6. Dunlop, *Torts Relating to Infants*, 5 W. ONT. L. REV. 116 (1966).

7. O'Neill, *supra* note 3, at 187.

8. Coleman v. Baker, 382 S.W.2d 843, 848 (Ky. 1964).

9. 76 S.D. 374, 79 N.W.2d 4 (1956).

10. 94 Cal. App. 2d 227, 210 P.2d 259 (1949).

the third case, *Sheets v. Pendergrast*,[11] the North Dakota Supreme Court upheld a finding that a seventeen-year-old had been grossly negligent in turning her head to talk with friends in the back seat while negotiating a gradual curve in the highway. The decision held that the minor, in view of her age, experience, and intelligence, had the capacity to perceive that her conduct could likely result in harm, and that a reasonable child of equal perception would not have conducted himself in this manner under like circumstances.

When the facts of the three cases are compared and the results contrasted, it would seem that the plaintiffs in the first two cases were victims of over-subjectivity, while the *Sheets* decision reflects less subjectivity and seemingly illustrates the proper application of the subjective standard.[12]

Notwithstanding the inherent problem of over-subjectivity in the subjective standard, many jurisdictions have clung to its application. Courts and legal periodicals have offered several reasons in justification of a subjective standard for minors. The most potent argument in favor of retaining the subjective standard is based on the elusive precepts of justice and fairness. The argument is that a minor cannot logically be expected to exercise the same degree of care as the mythical reasonable and prudent man. To exact of the infant an adult standard of care for the protection of his own safety or the safety of others would be to require him to exceed his capabilities and to exercise reason he does not have. One author has observed that the law "would shut its eyes, ostrich like, to the facts of life and to burden unduly the child's growth to majority,"[13] if it did not recognize the subjective standard.

It has also been argued that the subjective standard permits a child to develop skills without the apprehension of severe legal reprisals. Further, the utilization of the subjective standard to measure a child's conduct emphasizes individualization and thereby gives greater probity to the fault principle by narrowing the gap between legal and moral fault.[14]

Also it might be argued that legal recognition of the infirmities of youth has not been limited to issues of negligence. For example, con-

11. 106 N.W.2d 1 (N.D. 1960).

12. It is of interest to note that since *Mosconi v. Ryan*, the California courts have joined the growing ranks which advocate application of the reasonable man standard to minors engaged in adult activities. Prichard v. Veterans Cab Co., 47 Cal. Rptr. 904, 408 P.2d 360, (1965) (general rule on a child's standard of care does not apply where a minor engages in an activity which is normally undertaken only by adults).

13. Shulman, *supra* note 2, at 618. See Carbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931); cases cited note 11 *supra*.

14. Fleming, *supra* note 2, at 554.

tract,[15] agency,[16] and criminal law[17] acknowledge that infants are not capable of exercising the same judgment as adults. Even other sectors of tort law extend special treatment to the minor, as exemplified by the "attractive nuisance doctrine."[18]

The Changing View

The few early decisions involving child negligence arose out of play accidents. In these decisions, little opposition was offered to the application of the subjective standard, since prior to the twentieth century liability insurance was uncommon and as a consequence most children were execution proof.[19] It has been suggested that this factor underlies the view that since infants are not responsible for their youth and immaturity they are entitled to be judged by standards commensurate with their age, intelligence, and experience.[20]

At the time of the formulation of the subjective standard, there was no instrumentality so readily available to minors or so potentially destructive as the automobile. The automobile is no longer reserved by practice, mores, or law to adults. Children, teenagers in particular, are constantly expanding into adult fields of conduct. No longer are the penetrations of youth into adult activities tentative and experimental; rather they are constant and consistent. As a consequence of the high percentage of infant automobile accidents[21] and the great increase in liability insurance protection, many courts have reconsidered the social desirability of the subjective standard and have adopted the view that while infants are entitled

> to be judged by standards commensurate with their age, experience and wisdom when engaged in activities appropriate to their age, experience and wisdom, it would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standard of care and conduct than those expected of others.[22]

Thus,

> the age of a minor who operates a motor vehicle will not excuse him from liability for driving it in a negligent manner, and he

15. RESTATEMENT, CONTRACTS §§ 376, 431, comment *b* (1932).
16. SEAVY, AGENCY §§ 14B, C (1964).
17. 21 AM. JUR. 2D *Criminal Law* § 27 (1965).
18. PROSSER, TORTS § 59 (3d ed. 1964).
19. Fleming, *supra* note 2, at 555.
20. Bohlen, *supra* note 3, at 886.
21. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1966).
22. Dellewo v. Pearson, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961).

will be required to meet the standard established primarily for adults.[23]

Dissatisfaction with the subjective standard has resulted in a division of authority as to the standard to be required of a minor engaging in an adult activity. The *Restatement*[24] adopts the view that where an infant engages in an activity "which is normally undertaken only by adults and for which adult qualifications are required," he can no longer take advantage of his age and infirmities but is to be judged in accordance with the standard of conduct applied to an adult.

The argument in support of a uniform adult standard of care is founded partially upon an evaluation of social necessity. It has been argued that the current trend to adopting the adult standard is an equitable reaction to the disproportionate increase in accidents by minors.[25]

> When a minor assumes responsibility for the operation of so potentially dangerous an instrument as an automobile, he should "put off the things of a child" and assume responsibility for its careful and safe operation in the light of adult standards. The socially desirable policy of protecting infants from losses attributable to their lack of reason and experience should give way to the more necessary policy of making our highways as safe for the motoring public as the law can reasonably make them.[26]

If a child who engages in an adult activity cannot comprehend prospectively the hazards he creates, it certainly cannot be assumed that the application of a more stringent standard of care will deter him from im-

23. Prichard v. Veterans Cab Co., 47 Cal. Rptr. 904, 907, 408 P.2d 360, 363 (1965); *accord,* Ryan v. C & D Motor Delivery, 38 Ill. App. 2d 18, 186 N.E.2d 156 (1956) (a minor should be held to the same standard of care as an adult when operating a vehicle); Wilson v. Schumate, 296 S.W.2d 72 (Mo. 1956); Betzold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962) (standard of care for minor motorist is that standard of care required and expected of adult licensed drivers); Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430 (1961); Nielsen v. Brown, 232 Ore. 426, 374 P.2d 896 (1962) (logical and salutary to judge the behavior of children by the same standard that is applied to adults); Dawson v. Hoffman, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); Allen v. Ellis, 191 Kan. 311, 380 P.2d 408 (1963); Harrelson v. Whitehead, 263 Ark. 325, 365 S.W.2d 868 (1963) (no valid distinction between a vehicle driven by a minor and one driven by an unexperienced or reckless adult); Wagner v. Shanks, 194 A.2d 701 (Del. 1963) (judge the behavior of minors by the adult standard); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965).

24. RESTATEMENT (SECOND), TORTS § 283A, comment *c* (1965). See 2 HARPER & JAMES, TORTS 131 (1957); Annot., 97 A.L.R.2d 872, 876 (1964).

25. O'Neill, *supra* note 3, at 192.

26. Longeteig, *supra* note 3, at 111; see *Negligence-Application of Adult Standard to Minor,* 33 TENN. L. REV. 533 (1966).

prudence.[27] Therefore, the prime purpose for imposing a more exacting standard for measuring child conduct is to assure that fewer injuries will go uncompensated rather than to deter minors from creating hazards. A greater number of injuries will be redressed by the application of a uniform adult standard of care because most states have legislation imputing the negligence of the minor to the parent, guardian, or vehicle owner, who usually carry liability insurance. It is probable that if the conduct of the minor defendants in the *Chernotik v. Schrank*[28] and *Mosconi v. Ryan*[29] cases had been gauged against the standard of the reasonable man the results would have been different.

The uniform adult standard has also been justified by statutory construction. Most legislative enactments governing the operation of vehicles provide that "every person" or "all persons" are subject to the provisions of the statute.[30] Many courts have interpreted this broad terminology to mean that the legislatures intend minors as well as adults to be subject to the rules of the road. By this construction, a child's violation of a statute is held to be negligent per se since he has not met the standard of care which the legislature demands of all motorists.[31] Thus, litigation involving a minor's alleged violation of a statute does not turn upon whether the child has the capacity to perceive the risks occasioned by his conduct, but whether his actual conduct has violated the standard of care statutorily required.

In addition to the rules of the road, licensing statutes have provided support for the courts' application of a uniform adult standard. It has been argued that it would be paradoxical to hold an adult to a strictly objective standard and to hold a minor, engaged in the same activity, to a different and less exacting standard, when they presumably are equally capable since both met the same objective requirements for obtaining a license.[32]

In *Ewing v. Biddle*,[33] the Indiana Appellate Court recently adopted

27. Longeteig, *supra* note 3, at 105 (although fewer injuries will go uncompensated, it is recognized that a change in standards will probably have little effect upon the minor's driving habits).

28. 76 S.D. 374, 79 N.W.2d 4 (1956).

29. 94 Cal. App. 2d 227, 210 P.2d 259 (1949).

30. See, *e.g.*, IND. ANN. STAT. § 47-2019 (Burns 1965 Supp.).

31. Powell v. Hartford Acc. & Indem. Co., 398 S.W.2d 727 (Tenn. 1966); *Contra*, Morris, *Relation of Criminal Statute to Tort Liability*, 46 HARV. L. REV. 453, 469 (1933); Mertz, *supra* note 2, at 92 (a decision declaring an infant per se negligent on a violation of a statute can only be rationalized and supported by strong policy reasons which go beyond the ordinary bases and reasons justifying the use of negligence per se).

32. O'Neill, *supra* note 3, at 192.

33. 216 N.E.2d 863 (Ind. App. 1966). Other recent decisions adopting the uniform adult standard are: Daniels v. Evans, 35 U.S.L. WEEK 2276 (N.H. Sup. Ct. 1966) (overrules landmark decision of Carbonneau v. MacRury, 84 N.H. 501, 153 Atl. 457 (1931), to

the uniform adult standard, reasoning that:

> To give legal sanction to the operation of automobiles, bicycles or any other motor driven vehicle by a minor or teenager, with less than ordinary care, for the safety of others would be impractical as well as dangerous. If the rule were otherwise, a state of uncertainty would result, because then it would be a question for juries and courts to determine whether minors of various ages would be held to a different standard of care than adults and all others.
>
> In this modern day we must take judicial notice of the hazards of traffic, and travelers must not be forced to anticipate conduct other than that expected of all ordinary citizens.[34]

The court further supported its decision on the ground that Indiana statutes governing rules of the road do not specifically exempt anyone from their provisions, and therefore minors are within their purview.

Notwithstanding this decision to require a child to meet an adult standard for reason of social desirability, the Indiana court, by obiter dictum, still acknowledged that a youth does not normally possess an adult's capacity for judgment. The court announced that an adult motorist owes "a certain degree of care if he or she knows that a young person might be driving or operating a vehicle. . . ."[35]

Resolution

Whether the conduct of a minor engaged in an adult activity should be measured by the subjective standard or by the objective reasonable man standard turns on the ultimate issue whether courts should continue to recognize that children normally do not have the same capacity for judgment as an adult, or should subordinate this factor, as the court did in *Ewing v. Biddle*,[36] to the protection of the public interest and require a child to meet an adult standard of care.

One author,[37] in recognizing the difficulty of selecting between the subjective standard and the reasonable man standard, concludes that the

---

the extent that a child's conduct, when engaged in an adult activity, will be judged by an adult standard for reasons of public safety and expressed legislative policy); Powell v. Hartford Acc. & Indem. Co., 398 S.W.2d 727, (Tenn. 1966) (under the changed and existing circumstances which now prevail, a minor engaged in the operation of a motor vehicle should be held to an adult standard of care).

34. 216 N.E.2d at 867. The Indiana court, not unlike others, implies that the application of an adult standard to a minor will deter imprudence; this implication is questionable. See note 27 *supra*.

35. *Ibid.*

36. 216 N.E.2d 863 (Ind. App. 1966).

37. Dunlop, *supra*, note 6.

"better position, in view of the availability of liability insurance, is that the child should be held to the standard of an adult."[38] Through insurance, "you slip between the horns of the dilemma," since "you do not have to leave the loss upon the victim of substandard conduct, which would seem unfair, nor do you have to shift the loss to the substandard actor who just was not capable of acceptable [adult] conduct, which would also seem unfair."[39] This does not constitute a resolution of the problem, but rather a circumlocution of it. Furthermore, not all children are insured. Not all children can qualify for insurance coverage. Nor can the insurer's position be ignored, since in the last analysis the increasing cost of insurance protection is borne by the insured public.

In a majority of child negligence cases involving adult activity, judgments would be the same regardless of the standard adopted if the risk of over-subjectivity could be eliminated from the subjective standard. Thus, barring excessive subjectivity by the judge or jury, in most cases the subjective standard would be as responsive as the reasonable man standard to the public interest in compensating for negligently inflicted injuries as *Sheets v. Pendergrast*[40] demonstrates.

The selection of one standard over the other to measure the conduct of a minor engaged in adult activity often leads to a harsh result, as exemplified in the *Chernotik v. Schrank*[41] and *Mosconi v. Ryan*[42] decisions. Since both standards are supported by equally tenable arguments and by equally regarded authorities, reason suggests that a reconciliation of the conflicting policy considerations can be effected by a merger of the two standards. The dual objectives of providing compensation for injuries inflicted by minors engaged in adult activity and of avoiding the inequity of holding children, without exception, to an adult standard could be achieved by adopting a rebuttable presumption that a minor engaged in adult activity is capable of meeting an adult standard. The presumption of adult capacity is in accord with human experience and probability[43] since most children old enough to engage in adult activities such as operat-

38. *Id.* at 118.
39. *Id.* at 119.
40. 106 N.W.2d 1 (N.D. 1960).
41. 76 S.D. 374, 79 N.W.2d 4 (1956).
42. 94 Cal. App. 2d 227, 210 P.2d 259 (1949).
43. Jurisdictions which recognize that children after a certain age are presumably capable of adult discretion: Georgia: Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952); Pennsylvania: Zernell v. Miley, 417 Pa. 17, 208 A.2d 264 (1965); Texas: see note 46 *infra;* Utah: see note 44 *infra.* These jurisdictions do not limit the use of the presumption of adult capacity to cases involving children engaged in adult activities but assume that a child of fourteen years of age and over is capable of meeting the reasonable man standard of care in all activities. In City of Austin v. Hoffman, 379 S.W.2d 103 (Tex. 1964), the Texas court also indicated that it would apply the adult standard to any child regardless of age when engaged in an adult activity.

ing an automobile are old enough to be presumed to possess "discretion and physical capacity consistent with . . . the presumption of adult responsibility. . . ."[44] The potential harm that would result from negligent conduct in such activities is not so obscure that it is hidden from all but the most discerning eyes.

The presumption of adult capacity would be rebutted when the child establishes by a preponderance of the evidence that he did not possess the presumed capacity.[45] Thus, adult capacity would be presumed unless and until it could "be shown that the child is wanting in discretion or laboring under the handicap of some mental disability";[46] less evidence would not support a finding that a child engaging in adult activity did not possess adult discretion.[47] In the exceptional case where the child sustains such a burden, the traditional subjective standard of conduct would apply, and the issue would be whether the child displayed that degree of care which children of the same age, experience, and intelligence are accustomed to exercise under similar circumstances.

Traditionally, rebuttable presumptions have been created

> (a) to furnish an escape from anotherwise inescapable dilemma . . ., (b) to require the litigant to whom information as to the facts is more easily accessible to make them known, (c) to make more likely a finding in accord with the balance of probability, or (d) to encourage a finding consonant with the judicial judgment as to sound social policy.[48]

Utilization of the rebuttable presumption of adult capacity is justified since it accords with probability and provides the courts with an escape from the dilemma of selecting one standard over the other when both are supported by equally tenable arguments and authorities and either standing alone could lead to an inequitable result. This presumption representing a qualified union of the subjective and adult standards reduces the opportunity for an over-subjective decision; it serves the public interest without denying the child his day in court in his true posture.

---

44. Nelson v. Arrowhead Freight Lines, 99 Utah 129, 134, 104 P.2d 225, 228 (1940).

45. If less than a preponderance of evidence is required to rebut the presumption of adult capacity, the public interest in compensating negligently inflicted injuries might be subordinated in practical effect to the policy considerations supporting the application of the subjective standard.

46. City of Austin v. Hoffman, 379 S.W.2d 103, 107 (Tex. 1964). See Renegar v. Cramer, 354 S.W.2d 663 (Tex. Civ. App. 1962).

47. A lack of discretion might be evidenced by the child's age, lack of experience, education, or intelligence. It is difficult to visualize a situation where a licensed minor motorist could demonstrate by a preponderance of the evidence that he was not as capable as an adult of perceiving the hazards inherent in misconduct behind the wheel.

48. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 77 (1933). See generally MCCORMICK, EVIDENCE 309 (1954).

The inherent risk of over-subjectivity in the subjective standard might be eliminated by proper instruction to the jury on the effect of the adult presumption. Only in the rare situation where the child could rebut the presumption of adult capacity would the subjective standard apply to measure the conduct of a minor engaged in an activity normally reserved to adults.